

STATE OF MICHIGAN  
BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

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| In the matter of the application of )      |  |                  |
| <b>Consumers Energy Company</b> for )      |  | Case No. U-16861 |
| approval of refunds to retail electric )   |  |                  |
| <u>customers and for related relief.</u> ) |  |                  |

**NOTICE OF PROPOSAL FOR DECISION**

The attached Proposal for Decision is being issued and served on all parties of record in the above matter on September 19, 2012.

Exceptions, if any, must be filed with the Michigan Public Service Commission, 4300 West Saginaw, Lansing, Michigan 48917, and served on all other parties of record on or before October 10, 2012, or within such further period as may be authorized for filing exceptions. If exceptions are filed, replies thereto may be filed on or before October 24, 2012. **The Commission has selected this case for participation in its Paperless Electronic Filings Program. No paper documents will be required to be filed in this case.**

At the expiration of the period for filing exceptions, an Order of the Commission will be issued in conformity with the attached Proposal for Decision and will become effective unless exceptions are filed seasonably or unless the Proposal for Decision is reviewed by action of the Commission. To be seasonably filed, exceptions must reach the Commission on or before the date they are due.

MICHIGAN ADMINISTRATIVE HEARING  
SYSTEM  
For the Michigan Public Service Commission

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Sharon L. Feldman  
Administrative Law Judge

September 19, 2012  
Lansing, Michigan

STATE OF MICHIGAN  
MICHIGAN ADMINISTRATIVE HEARING SYSTEM  
FOR THE MICHIGAN PUBLIC SERVICE COMMISSION

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**PROPOSAL FOR DECISION**

**I.**

**PROCEDURAL HISTORY**

On September 9, 2011, Consumers Energy Company filed an application seeking Commission review of a settlement agreement. This settlement agreement resolved the company's lawsuit against the United States Department of Energy (DOE), which arose from the DOE's failure to start accepting Spent Nuclear Fuel (SNF) by the 1998 deadline in the Nuclear Waste Policy Act of 1982 and the standard contract executed as required by that Act.

The company's filing presents the settlement agreement as Exhibit A-1, proposes to refund \$23.3 million to ratepayers through a six-month credit (or "negative surcharge") of \$0.001277/kWh, and seeks approval of accounting entries consistent with its proposal. The filing was accompanied by the prefiled testimony of Jeffrey S. Theuer, Patrick M. Fitzgerald, and Michael A. Torrey.

At the October 28, 2011 prehearing conference, the company and Staff appeared, and the following parties intervened: Attorney General Bill Schuette, the Association of Businesses Advocating Tariff Equity (ABATE), and the Michigan Community Action Agency Association (MCAAA).

In accordance with the schedule established at the prehearing conference, Staff filed the testimony of Kirk D. Megginson and MCAAA filed the testimony of Ron Callen and William Peloquin on February 14, 2012, and Consumers Energy filed the rebuttal testimony of Mr. Theuer and Mr. Torrey on March 9, 2012. Consumers Energy, Staff, and the Attorney General filed briefs May 16, 2012; MCAAA filed its initial brief on May 17, 2012, but the parties indicated to the Administrative Law Judge that they did not object to the late filing. Consumers Energy, Staff, the Attorney General, MCAAA, and ABATE filed reply briefs on May 30, 2012.

## II.

### **OVERVIEW OF THE RECORD AND POSITIONS OF THE PARTIES**

This section reviews the testimony presented by Consumers Energy, Staff, and the MCAAA, as well as the recommendations made by the parties in their briefs.

#### **Consumers Energy**

Mr. Theuer's testimony described the background and terms of the settlement agreement.<sup>1</sup> Mr. Theuer is an attorney and a member of the law firm Loomis, Ewert, Parsley, Davis & Gotting, P.C. He represented Consumers Energy in its litigation and subsequent settlement with the federal government. He explained that the litigation

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<sup>1</sup> Mr. Theuer's testimony is transcribed at 2 Tr 46-114.

began with Consumers Energy's lawsuit in the Court of Federal Claims in 2002, and was resolved by the July 11, 2011 settlement agreement. He testified that the company's lawsuit sought damages incurred by Consumers Energy due to the federal government's delay in accepting SNF, which is now stored at Big Rock and Palisades. These damages include the costs of constructing and maintaining the Independent Spent Fuel Storage Installations (ISFSIs) at these sites, the cost of fabricating and loading dry fuel storage casks, and a \$30 million payment made to Entergy as part of the sale transaction. Mr. Theuer also reviewed some of the federal government's positions in response to the company's claim. He further explained that the lawsuit did not seek recovery of the "DOE Liability" attributable to the one-time fee assessed on nuclear generation prior to April 7, 1983, or the ongoing fees associated with nuclear generation, testifying that those fees cannot be recovered because the federal government still has a statutory obligation to dispose of the SNF. He identified the key provisions of the settlement agreement as follows:

- (i) A damage award of \$120 million;
- (ii) Acknowledgment that the award covers all of Consumers Energy's claims through April 11, 2007, the date that Consumers Energy transferred the Palisades plant and Big Rock ISFSI and SNF to Entergy;
- (iii) Full payment of the DOE Liability (\$163,102,173) and the debt extinguished;
- (iv) The \$120 million settlement amount includes recovery by Consumers Energy of the \$30 million payment that was made to Entergy in exchange for Entergy's agreement to accept title to and all future responsibility for the Big Rock ISFSI and SNF. Thus, Consumers Energy agrees to indemnify the federal government under certain circumstances for the first \$30 million of claims asserted by Entergy arising after April 11, 2007 that result from DOE's failure to accept delivery of the SNF stored at the Big Rock

site. This indemnification provision is simply recognition that Entergy effectively recovered that amount of costs when it accepted title to the ISFSI in exchange for the \$30 million payment from Consumers Energy, and that Consumers Energy is recovering the \$30 million payment via the settlement.<sup>2</sup>

Mr. Theuer referred to Mr. Torrey's analysis of the benefits of the settlement agreement, and identified as an additional benefit of the settlement agreement avoidance of the litigation risks that the award at trial would be less than the \$120 million recovered through the settlement agreement, and that the federal government would appeal any award.<sup>3</sup> In addition to presenting the settlement agreement in Exhibit A-1, he also presented in Exhibit A-2 an August 24, 2011 letter from the DOE acknowledging that the company's one-time fee payment of \$163,102,172.50 had been made.

Mr. Theuer also presented rebuttal testimony discussed below, and was subject to cross-examination.

Mr. Torrey is Executive Director of the Rates and Business Support Department. He testified to present the company's proposed allocation of the proceeds from the settlement agreement, shown in Exhibit A-3. As noted above, the company's proposal results in a refund of \$23.3 million to ratepayers, with the credit calculations presented in Exhibit A-4, and the applicable tariff sheets presented in Exhibit A-5.

Mr. Torrey testified that the company's proposal is based on returning to the ratepayers amounts that can be traced to ratepayer contributions: these are set forth in the top portion of Exhibit A-3 and total the \$23.3 million the company proposes to

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<sup>2</sup> See 2 Tr 54.

<sup>3</sup> See 2 Tr 57.

refund.<sup>4</sup> He testified that the company further proposes to allocate the remaining \$96.7 million to the following items: Big Rock ISFSI (\$54.6 million); payment to Entergy (\$30 million); and litigation and miscellaneous costs (\$12.1 million). He further testified that the miscellaneous costs include \$4.9 million in fees to obtain a letter of credit required by the Palisades sale agreement.

He testified that he did not include financing, interest, or carrying costs based on Mr. Theuer's testimony that such costs were not recoverable. Mr. Torrey identified ratemaking benefits to customers from the settlement based on the company's proposed allocation of the proceeds, including the company's commitment that if its proposed allocation is accepted, it will not seek any further recovery of certain costs from ratepayers.<sup>5</sup> He further testified that customers benefitted from the company's payment of the one-time fee to DOE because it eliminated the risk that the trust fund that would otherwise have been established would be insufficient to discharge the obligation when it became due, and customers were not disadvantaged by the payment.<sup>6</sup>

Mr. Torrey also presented rebuttal testimony and was subject to cross-examination.

Patrick M. Fitzgerald is the Director of Property Accounting and Depreciation for Consumers Energy.<sup>7</sup> His testimony describes the journal entries the company is proposing to account for the settlement proceeds. He presented Exhibit A-6 to show these journal entries, consistent with the allocation set forth in Exhibit A-3.

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<sup>4</sup> Mr. Torrey's testimony is transcribed at 2 Tr 133-176.

<sup>5</sup> See 2 Tr 145-146.

<sup>6</sup> See 2 Tr 146-147.

<sup>7</sup> Mr. Fitzgerald's testimony is transcribed at 2 Tr 115-133.

Mr. Fitzgerald was also subject to cross-examination.

### MCAAA

Mr. Peloquin, a C.P.A. and independent consultant to MCAAA, testified that the refund amount proposed by the company in Exhibit A-3 should be increased by \$33.7 million to a total of \$57 million to reflect the company's additional post-securitization investment in the Palisades ISFSI.<sup>8</sup> His Exhibit MCAAA-5 contains workpapers provided by Mr. Torrey in discovery, as well as Mr. Peloquin's calculation of the costs attributable to the Palisades ISFSI not otherwise reflected in Exhibit A-3. He testified that the company essentially recovered these ISFSI costs by deducting them from the Palisades sale proceeds refunded to ratepayers in Case No. U-14992, and should now be required to refund settlement agreement proceeds to cover these costs. His revision to the refund proposal presented in Exhibit A-3 is presented in his Exhibit MCAAA-6.

Although not included in the refund calculations in Exhibit MCAAA-6, Mr. Peloquin also recommended that the Commission refund a portion of the \$12.1 million in "litigation and miscellaneous costs" attributable to the letter of credit fees, arguing that a claim for the letter of credit fees had not been included in the company's litigation, and the Commission had previously ruled them not recoverable. Finally, Mr. Peloquin recommended that the Commission still require Consumers Energy to place amounts equivalent to the one-time fee in trust, testifying that the company's decision to pay the one-time fee was imprudent.

Mr. Peloquin was also cross-examined on his testimony.

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<sup>8</sup> Mr. Peloquin's testimony is transcribed at 2 Tr 272-289.

Mr. Callen, an independent consultant and technical advisor for MCAAA who has worked extensively in the area of nuclear decommissioning and spent nuclear fuel disposal, also testified regarding the SNF fees.<sup>9</sup> He presented Exhibits MCAAA-1 through MCAAA-4, showing the total amounts the company has paid DOE under the standard contract for SNF disposal, and how much utilities across the country have paid. His testimony reviews the history of federal government activities, as well as some of the federal court decisions articulating the federal government's obligations under the standard contract and the utilities' rights to recover for breach of those obligations. Mr. Callen testified that the federal government has abandoned its obligations under the NWPA and the standard contract to find a repository for the SNF. He concludes that the federal government has "wholly repudiated" its duties, amounting to what he considers a total breach of its obligations. He explained his opinion that the company had not met its burden to show that it was reasonable and prudent in administering and enforcing the standard contract, including his opinion that it was imprudent for the company to pay the \$163 million outstanding one-time fee liability:

- (i) CECo was under no obligation to make the one-time fee payment because the obligation to pay was not due until the federal government commenced accepting its SNF for disposal, an event that now may never occur;
- (ii) the \$163 million in contract fees was collected from CECo's ratepayers based upon the premise that the payment of the fees was for the specific purpose of providing for SNF disposal, a contractual obligation that the federal government has breached;
- (iii) the Commission in more than one order in U-15645 and U-16191 has provided for CECo to place the \$163 million ratepayer-supplied funds in trust, which remedy was accompanied by Commission findings in U-16191 that the payment of the DOE Liability to the federal government would be imprudent; nevertheless, CECo subsequently defied these

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<sup>9</sup> Mr. Callen's testimony is transcribed at 2 Tr 199-272.

Commission orders and findings by paying the DOE liability to the federal government in July 2011;

(iv) CECo has separated the \$163 million in financial resources from the trust remedy -- a remedy that would have protected these funds for the expressed and specific purpose for which they were collected in the first instance -- to provide SNF disposal;

(v) CECo's payment of the \$163 million DOE Liability to the federal government rewards the federal government for its contract failure; in inexplicable contrast to the federal Court holdings declaring that the payment of the fees was a reciprocal obligation to the federal governments disposing SNF, CECo has in July 2011 nevertheless thus paid the [one-time] fee to the federal government. CECo in 1983 selected the option to hold and not pay the DOE Liability . . . to the federal government until (and unless) the federal government started to dispose of its SNF. Now, when the federal government has reversed from a delay in performance of SNF disposal to an outright repudiation of contract performance of SNF disposal under the Standard Contract, and has also undertaken many actions to disable its future ability to perform SNF disposal -- CECo now in this context has rewarded the federal government for its SNF disposal contract failure by nevertheless paying the federal government the entirety of the \$163 million DOE Liability, and without getting anything in return. This constitutes imprudent and unreasonable conduct by CECo.<sup>10</sup>

Mr. Callen recommended that the Commission require Consumers Energy to refund to ratepayers the amounts he believes were imprudently paid to the federal government, or create a trust fund to hold those amounts.

Mr. Callen was also cross-examined, and clarified his direct testimony by indicating that he does not recommend refunds of the ongoing SNF fee amounts.

### Staff

Mr. Megginson, Financial Specialist with the MPSC, presented Staff's review of the company's proposal.<sup>11</sup> He testified that the company's proposed \$23.3 million

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<sup>10</sup> See 2 Tr 214-215.

<sup>11</sup> Mr. Megginson's testimony is transcribed at 2 Tr 217-221.

refund returns to ratepayers amounts that they paid through rates, finding no material discrepancy in the analysis based in part on Exhibit S-1:

Staff submitted audit requests to the Company questioning whether any of the costs netted out were for expenses previously covered by ratepayers and if ratepayers were receiving a 100% refund of funds provided to Consumers for DOE related items. The Company confirmed that it was refunding all proceeds that were collected from customers that were part of its DOE claim.<sup>12</sup>

He further testified to Staff's conclusion that the company's proposed refund is reasonable.

Mr. Megginson was also cross-examined on his testimony.

### Rebuttal

Mr. Torrey testified in rebuttal to Mr. Callen and Mr. Peloquin. Regarding the reasonableness and prudence of the settlement agreement, Mr. Torrey testified that Mr. Callen had not identified any specific act or failure to act by Consumers Energy, asserting that in paying the one-time fee, Consumers Energy carried out its responsibilities under federal law, and the settlement agreement offered the opportunity to settle the company's claims on a favorable basis. He further testified that the company no longer had the funds in its possession.

Responding to Mr. Peloquin's proposed additional refund amount, he reiterated that the company is proposing to refund all amounts paid by ratepayers. In addition, he testified that Mr. Peloquin's proposed adjustment for the Palisades ISFSI requires the speculation that the costs were recovered in the settlement agreement, asserting that \$30 million in costs included in the company's claim were not recovered under the

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<sup>12</sup> See 2 Tr 183.

settlement agreement, and it is not possible to tell with certainty what costs were recovered under the settlement agreement. He further testified that Mr. Peloquin's analysis is premised on a conclusion that Entergy would have paid the same purchase price had the book value of Palisades ISFSI not been transferred to Entergy, and also disputed that ratepayers should be entitled to 100% of any additional amount over book value attributable to the Palisades sale.

Mr. Theuer also testified in rebuttal to Mr. Callen, asserting that the company did not and does not have a claim for refund of the SNF disposal fees. He testified that a claim for refund of the fees must be premised on a total breach theory, rather than the partial breach theory the company pursued in its litigation, and a total breach theory would require a change in the law, or would otherwise require the government to repudiate the standard contract. He further testified that the company had not waived its ability to seek refunds of SNF disposal fees in the event of a total breach by the federal government, asserting that such a claim was not released by the settlement agreement. His rebuttal testimony further discusses the litigation risks associated with the DOE lawsuit.

#### Positions of the Parties

The final recommendations of those parties presenting testimony generally follow the testimony of their witnesses. In its briefs, Consumers Energy requests that the Commission approve the settlement agreement and the proposed allocation and accounting for the settlement proceeds, based on the testimony of its witnesses and Mr. Megginson. Consumers Energy also asks that the Commission formally rescind its requirement that the utility establish a trust fund for the DOE one-time fee liability. Staff

likewise argues that the settlement agreement and the proposed allocation and accounting should be approved.

Only MCAAA challenges the reasonableness and prudence of the settlement agreement in its briefs, requesting that the Commission adopt remedies to protect the ratepayers based on Mr. Callen's and Mr. Peloquin's testimony, including the establishment of a trust fund equivalent to or exceeding the company's DOE liability payment or refunds to ratepayers of the equivalent amount. MCAAA also asks the Commission to increase the refund of settlement proceeds to ratepayers as recommended by Mr. Peloquin.

The Attorney General supports the reasonableness and prudence of the settlement agreement, and argues in opposition to the MCAAA's proposed SNF fee trust fund or refund remedies. In his reply brief, however, the Attorney General endorses MCAAA's recommendation regarding the appropriate refund of settlement proceeds to account for Palisades ISFSI costs, or in the alternative, a smaller additional amount he contends was paid by ratepayers.

ABATE's reply brief endorses the company's proposed allocation of the proceeds, refund calculation and accounting, and urges the Commission to reject MCAAA's arguments. ABATE further asks the Commission to "accept and affirm Consumers' commitment that it will not seek any further recovery from customers of: (1) the Big Rock ISFISI costs; (2) the \$30 million Entergy payment; (3) the \$12 million of

“other” costs; and (4) any portion of the litigation costs associated with prosecuting the Court of Federal Claims lawsuit.”<sup>13</sup>

The record evidence and the briefs of the parties are discussed further below.

### III.

#### **DISCUSSION**

The issues presented in the parties’ briefs fall into two categories. First, MCAAA’s challenges to the reasonableness and prudence of the settlement agreement are discussed in section A. Second, MCAAA’s and the Attorney General’s arguments that the refund should be increased to cover claims associated with the Palisades ISFSI are discussed in section B.

#### A. Reasonableness and Prudence of the Settlement Agreement.

MCAAA contends that the company ignored its fiduciary obligation to ratepayers in agreeing to pay the \$163 million one-time fee, citing prior Commission orders in support of its claim that the Commission has already found payment of the one-time fee would not be prudent, and arguing that the benefits of the settlement are minimal.

MCAAA argues that Consumers Energy was not required to make the one-time fee payment to recover damages under existing law, characterizing the payment as voluntary.<sup>14</sup> MCAAA further argues that because the payment was not required, Consumers Energy made the payment in exchange for a larger settlement award to benefit itself: “CECo has also induced the federal government to enter into the

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<sup>13</sup> See ABATE reply brief, page 1.

<sup>14</sup> See MCAAA brief at page 7.

settlement by unnecessarily giving away the \$163 million of ratepayer-collected funds comprising the DOE Liability – so CECo could obtain reimbursement of its \$30 million payment to Entergy (for future costs at Big Rock).”<sup>15</sup>

MCAAA also argues that in making the payment, Consumers Energy failed to preserve a right to seek damages or recoupment of fees paid if the federal government entirely defaults on its obligations under the NWPA and standard contract. In arguing that the federal government has abandoned its obligations under the NWPA and the standard contract, MCAAA contends that a “total breach” claim seeking at least return of the SNF fees paid under the contract is a realistic claim under the current circumstances. MCAAA relies in part on Mr. Callen’s testimony describing the degree to which the federal government has ceased pursuing a permanent waste disposal site for the SNF. In arguing that Consumers Energy imprudently released this claim, it also argues that Entergy could not bring such a claim because it did not pay the SNF fees.

As a remedy, MCAAA seeks to have the Commission establish a trust fund for both the one-time liability amount and the total of the ongoing fee payments made by Consumers Energy, or provide for refunds of equivalent amounts.

In support of the reasonableness and prudence of the settlement agreement, Consumers Energy cites the benefits identified by Mr. Torrey and Mr. Theuer, reviewed in the company’s brief at pages 11-12. The company further argues that the customers would have received no benefit from a refusal to pay off the DOE liability—and argues

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<sup>15</sup> See MCAAA brief, pages 28-29.

that even MCAAA's witnesses acknowledged that withholding payment was not likely to have a positive impact on the federal government.<sup>16</sup>

In its reply brief, the company argues that in agreeing to the settlement, Consumers Energy nevertheless preserved the right to seek damages for "total breach" regardless of how unlikely such an event was, citing Mr. Theuer's testimony as follows:

Q. Has Consumers Energy retained the right to file another lawsuit in the future?

A. Potentially. If it were to occur, that a change in law occurred and a total breach claim could be brought, we believe that this settlement agreement preserves that right.

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Q. Where in the settlement agreement is it, has Consumers preserved the right to potentially file a damage suit or another suit in the future?

A. In Article II on page 5 of the settlement agreement [Exhibit A-1], this refers to the release language. It says 'Consumers Energy releases, waivers, and abandons any and all of Consumers Energy's claims against the United States, its political subdivisions, its officers, agents, and employees that arise out of DOE's delay in performance.'

It's those words, delay in performance, that are the critical distinction. This is a partial breach case and it's a partial breach release. The partial breach is based on the delay in performance, not a complete breach in performance obligation.<sup>17</sup>

Staff finds the company's settlement reasonable and prudent. Staff's brief reviews the Commission's prior orders. Staff's brief at page 8 concludes: "It is Consumers Energy's position that under the settlement agreement the Company has reserved the right to file a claim for a refund of SNF fees arising from a total breach or repudiation of the Standard Contract. 2 Tr 61." Staff has concluded that the need for the

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<sup>16</sup> See Consumers Energy brief, pages 14-15, citing Callen, 2 Tr 267-268.

<sup>17</sup> See 2 Tr 79-80.

trust was mooted by the settlement, and recommends that the Commission issue an order rescinding the directive that Consumers Energy establish and fund the DOE trust.<sup>18</sup> Additionally, Staff addressed MCAAA's arguments regarding a trust for the ongoing fees, asserting that Mr. Callen withdrew that recommendation, and that such a trust is unsupported on this record.<sup>19</sup>

The Attorney General also finds the settlement agreement reasonable and prudent. The Attorney General argues with regard to the \$163 million payment, that there is and was no dispute that CECo collected the money from ratepayers to recover the future obligation to the DOE, CECo is no longer benefitting from the use of ratepayer funds:

By making full payment to DOE, CECo no longer has possession of the \$163 million and is not benefitting from the use of ratepayers money. Therefore, only very speculative claims either that the federal government will completely breach the Standard Contract, which federal courts have ruled has not yet occurred, or that Congress will repeal the NWPA would support a claim that this money should be refunded to ratepayers. Further, if the MPSC ordered refunds, then Michigan utilities and ratepayers would be responsible for years and years of costs to permanently store SNF in Michigan.<sup>20</sup>

Addressing MCAAA's trust fund proposals, the Attorney General contends in his reply brief that the Commission should rescind its previous trust order for the reasons addressed in his initial brief, and should also reject a trust fund for the \$260 million in ongoing SNF fees paid.

To resolve the disputes among the parties, some context is appropriate. The one-time fee payment reflects SNF disposal fees assessed under the NWPA for

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<sup>18</sup> See Staff brief at page 11.

<sup>19</sup> See Attorney General reply brief, pages 4-5.

<sup>20</sup> See Attorney General brief, page 22.

generation prior to the effective date of the NWPA, April 7, 1983. The Commission approved Consumers Energy's choice of the contractual option to defer payment of the one-time SNF fee in its May 7, 1991 order in Case No. U-9346.<sup>21</sup> Subsequently, in its March 27, 2007 order in Case No. U-14992, the Commission found Consumers Energy's proposed sale of Palisades to Entergy to be reasonable.<sup>22</sup> The Commission noted that the asset sale agreement provided for Consumers Energy to retain the liability for payment of the pre-1983 disposal fees, but found MEC/PIRGIM's request for a trust fund for those fees outside the scope of its review in that proceeding.<sup>23</sup> Not until its November 2, 2009 order in Case No. U-15645 did the Commission determine that the funds should be placed in a trust, and direct the company to present a proposal in its next rate case, which was Case No. U-16191.

Also as background, the litigation that led to the settlement agreement under review in this case was brought in the United States Court of Federal Claims in 2002. The parties do not dispute that Consumers Energy filed its claim for damages due to the "partial breach" by DOE in not accepting SNF by the contractual date. Before this action was filed, utilities across the country brought various actions seeking to clarify their rights under the NWPA and standard contract. Mr. Callen and Mr. Theuer reference some of these cases in their testimony. The parties distinguish the "partial breach" claim Consumers Energy actually brought, which sought damages due to the delay in accepting SNF up to the date of Consumers Energy's sale of its nuclear assets to Entergy, from a "total breach" claim, which would seek to hold the federal government

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<sup>21</sup> This option required the payment of interest, so at the date of the settlement agreement, the amount of the deferred liability was approximately \$163 million.

<sup>22</sup> The Commission declined to formally approve the sale agreement, see pages 45-46, but it approved the associated PPA with Entergy subject to certain conditions discussed in the order.

<sup>23</sup> See March 27, 2007 order, page 54.

in total default of its contractual obligations, although the parties do not necessarily agree on the elements or consequences of such a claim.

1. Prior Commission orders

In arguing that the settlement agreement is not reasonable and prudent because it required payment of the one-time fee liability, MCAAA cites the Commission's November 4, 2010 decision in Case No. U-16191 as finding that it would be unreasonable and imprudent for Consumers Energy to pay the DOE liability.<sup>24</sup> In response, Consumers Energy argues that the Commission subsequently revised this holding in its March 17, 2011 decision in that case.

A review of the Commission's decisions in Case No. U-16191 shows that the Commission's November 4, 2010 order addressed payment of the one-time fee only in the context of Consumers Energy choosing to pay the money to the DOE rather than place it in trust. Presented with the potential payment of the DOE liability in the context of a settlement agreement, the Commission clarified that its earlier holding was not intended to apply in that context. Thus, in its March 17, 2011 order, the Commission quoted its earlier holding and clarified as follows:

In the November 4 order, the Commission observed:

The Commission agrees with the Staff, MCAAA, and MEC that Consumers' proposal to pay the DOE liability and extinguish the obligation at this time would be imprudent. As discussed by MCAAA, the federal government has defaulted on the Standard Contract, and it is unlikely that SNF will be collected by the federal government in the foreseeable future. The Commission finds that Consumers' proposal to pay the DOE liability will reward the federal government for its default on its contractual obligation and could create legal problems for Consumers in its enforcement of the statutory and contractual agreement with the federal government. Furthermore, Consumers' proposal to extinguish the

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<sup>24</sup> See, e.g., MCAAA brief, page 68.

DOE liability puts ratepayers at significant risk because Consumers will be using ratepayer funds to pay the federal government for a service that it may never receive.

November 4 order, p. 51.

**The Commission did not intend the above quoted portion of the November 4 order to prejudge the terms of any settlement agreement that Consumers may be inclined to enter into with the DOE for the DOE's breach of the Standard Contract.** In light of Consumers' claim that the opportunity to settle the litigation with the DOE may be open for only a limited period, the Commission finds that it should grant Consumers 90 days from the date of this order to consummate the proposed settlement if the company chooses to do so. Within 60 days of entering a settlement, Consumers shall file an application in a new docket that will address the disposition of the settlement proceeds and permit all interested parties to weigh in on the reasonableness and prudence of the agreement.

With regard to the trust fund obligation, the Commission agrees with the Staff that if the company enters into a settlement, it may petition the Commission to be relieved of the obligation to fund all or any part of the trust.<sup>25</sup>

Thus, the Commission has not already determined that payment of the DOE liability as part of a settlement agreement would be unreasonable and imprudent.

## 2. Benefits of the settlement agreement

Turning to a review of the settlement agreement, Consumers Energy reasonably identifies certain benefits arising from the settlement agreement, including the receipt of \$120 million, and the end of its costly litigation with the United States.<sup>26</sup> But Consumers Energy does not directly address MCAAA's argument that the case law at the time of settlement did not require utilities to pay the one-time fee as a condition of receiving a damage award, and thus the payment was voluntary. Indeed, a review of the trial

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<sup>25</sup> See March 17, 2011 order, pages 7-8 (emphasis added).

<sup>26</sup> See Torrey, 2 Tr 145-147; Theuer 2 Tr 57-58. Some of the identified benefits are based on the company's proposed allocation of refunds, and are discussed in section B below.

court's most recent order addressing this issue indicates that for litigation purposes, the United States had dropped such a claim.<sup>27</sup>

A review of the settlement agreement, however, indicates a significant motivation for the payment. It appears that DOE had refused to approve the assignment of the NWPA obligations to Entergy contained in the Palisades sale agreement. Thus, the DOE settlement agreement recites:

By letter dated December 4, 2006, Consumers Energy notified the Contracting Officer, Department of Energy (DOE), for the Contract that Consumers Energy intended to assign its Contract to Energy at the close of the sale of the plants. By letter dated February 6, 2007, the DOE contracting Officer notified Consumers Energy that DOE objected to the proposed assignment because Consumers Energy intended to retain the obligation to pay the one-time fee. Consumers Energy warrants that it has assigned all of its rights and obligations pursuant to the Contract except for the obligation to pay the one-time fee, provided for in Section III of this Agreement, and its claims described in the Asset Sale Agreement (which are the subject of this Settlement Agreement). **As part of and to effectuate this settlement, the Government exercises its sole discretion to accept the assignment of the Standard Contract from Consumers Energy to Entergy because Consumers Energy will pay its one-time fee with this settlement. The assignment shall be deemed effective as of April 11, 2007.**<sup>28</sup>

Based on the settlement agreement's resolution of this outstanding issue, and as a result of the \$163 million payment, DOE acknowledges that it accepts the assignment of the ongoing waste disposal obligations to Entergy. Mr. Theuer noted this in his testimony at 2 Tr 62.<sup>29</sup>

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<sup>27</sup> See Theuer, 2 Tr 67-68. And see *Consumers Energy Co v United States*, unpublished order of the United States Court of Claims, issued January 11, 2011 (Docket No. 02-1894C), 2011 WL 8144367, 3 ("The government, while disagreeing with the Circuit's ruling, acknowledges that the Circuit's ruling is binding on this court and does not seek to deduct the one-time fee from any damage award in this case.")

<sup>28</sup> See Exhibit A-1, pages 3-4, paragraph F (emphasis added).

<sup>29</sup> This record does not establish whether Consumers Energy had previously presented a concern to the Commission that the company's assignment to Entergy had not been accepted, and that DOE considered the company to retain continuing obligations under the NWPA and standard contract in addition to the potential payment of the one-time fee.

Recognizing that the company had a legitimate incentive to pay the one-time fee to avoid continuing responsibility for nuclear waste disposal under the standard contract does establish that the purpose of the payment was not simply a voluntary act to avoid a trust fund obligation or to increase the settlement proceeds. The government's acceptance of the assignment clearly benefits ratepayers. That the company had a legitimate reason for making the payment, however, does not fully resolve the issue of the reasonableness and prudence of the settlement agreement.

3. Ratepayer interests in the one-time fee liability trust fund

Although discharge of the DOE liability had a benefit to ratepayers in securing DOE's acceptance of the assignment to Entergy, any benefit must be balanced against any cost. Part of the dispute between Consumers Energy and MCAAA is whether Consumers Energy's retention of the funds served any purpose other than to ensure that they would be available to pay the DOE when the liability became due. Consumers Energy argues in this context that the ratepayers are indifferent to whether the DOE liability was paid or a trust fund established. As MCAAA recognizes,<sup>30</sup> the Commission clearly rejected this argument in choosing to impose a trust requirement in Case Nos. U-15645 and U-16191. It was in this context—as opposed to the context of a settlement agreement—that the Commission found it would be unreasonable for the company to discharge the DOE liability.

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<sup>30</sup> See MCAAA's brief at page 29, reply brief at page 8.

MCAAA cites the Commission's decision in Case No. U-15645.<sup>31</sup> The Commission's November 2, 2009 order in that case directed the company to file a proposal to establish a trust in its next rate case:

The Commission also agrees with MEC/PIRGIM that segregating pre-1983 DOE liability into a trust fund has become necessary because of the uncertainty surrounding future payment of the funds, and because the liability has grown quite large.<sup>32</sup>

The Commission described MEC/PIRGIM's arguments for the trust as follows:

MEC/PIRGIM further argued that the pre-1983 DOE liability should be placed into a trust because that treatment would be consistent with the fact that ratepayers paid the principal amount years ago, it would save Consumers letter of credit fees, and it would protect ratepayer funds in the event that the DOE finally disposes of the SNF. Given the disarray in the DOE's disposal program and its failure to meet the 1998 deadline to begin accepting fuel for disposal, MEC/PIRGIM also contends that segregation of the funds into a trust would ensure the availability of the funds to provide for whatever disposal costs are ultimately required.<sup>33</sup>

Thus, as MCAAA argues, the Commission did attribute a benefit to the company and its ratepayers from retaining the money, beyond simply assuring that the liability would be paid when due.

Presumably because Consumers Energy does not assign value to retaining the one-time fee liability funds, the company did not perform a benefit-cost analysis of the settlement agreement. Indeed, it is difficult to determine how to value the retention of the one-time fee money to compare that to the benefits obtained in the settlement

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<sup>31</sup> See MCAAA reply brief, page 8: "The SNF fee trust for the \$163 million of the ratepayer-supplied SNF fee funds for pre-1983 generation was necessary because the payment of these funds to the federal government would be imprudent in light of the federal contractual breach and because the federal courts have determined that such payment obligation does not exist absent SNF disposal. The trust was also necessary to protect the funds and ensure their availability to ensure eventual SNF disposal. The trust requirement recognizes the nexus between the collection of the fees and SNF disposal – and not the collection of the fee to pay to the federal government for its failure to perform SNF disposal and for now disabling its capability to perform SNF disposal."

<sup>32</sup> Order page 15.

<sup>33</sup> Order, page 13.

agreement. Mr. Theuer testified that the government had taken the litigation position that deferring payment of the DOE liability had a cumulative value of \$79 million over a certain time period,<sup>34</sup> but the details of this calculation and the company's response were not presented on this record. Ultimately, the value of the fund as retained by Consumers Energy rather than as used to discharge the liability is tied to the parties' arguments regarding Consumers Energy's ability to bring a "total breach" claim, and is discussed further in that context in the following subsection.

#### 4. Waiver of future claims

MCAAA argues that the company failed to protect the ratepayers' interest in return of the SNF fees, should the federal government fully default on its obligations to dispose of the SNF. MCAAA in particular argues that Consumers Energy released a claim for "total breach" of the standard contract as part of the settlement agreement. Consumers Energy argues both that it does not have and may never have a "total breach" claim, and that it did not waive such a claim in the settlement agreement.

As noted above, the parties acknowledge that the litigation brought by Consumers Energy that resulted in the settlement agreement was a claim for damages due to DOE's "partial breach" of the settlement agreement. The settlement contains a release clause that provides as follows:

Upon satisfaction of the terms set forth in this Settlement Agreement, including but not limited to payment of the Settlement Amount of \$120,000,000, Consumers Energy releases, waives, and abandons any and all of Consumers Energy's claims against the United States, its political subdivisions, its officers, agents, and employees that arise out of DOE's delay in performance of its acceptance obligations under the contract, regardless of whether such claims were included in Consumers

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<sup>34</sup> See Theuer, 2 Tr 95. The time period for this valuation was 1998 to the pretrial conference. Also see Exhibit MCAAAA-10, discovery response U-16861-MCAA-CE-10.

Energy's submission to the Government and including, but not limited to, any claim for legal costs, expense, attorney fees, compensatory damages, and exemplary damages. **Consumers Energy releases, waives and abandons any and all claims related to or arising out of DOE's delay in performance of its acceptance obligations under the Contract, whether in the Court of Federal Claims or any other court.** Consumers Energy further releases any and all claims related to impaired or diminished value of the property upon which the Big Rock plant was located.<sup>35</sup>

Looking at this release language, MCAAA argues that the word "delay" is not defined or otherwise limited in the settlement agreement and could include a release for a permanent "delay" in performance.<sup>36</sup> In response, Consumers Energy relies on Mr. Theuer's testimony that the "delay" terminology is recognized in the area to distinguish partial breach from total breach.<sup>37</sup>

Mr. Theuer also testified to his opinion that a "total breach" claim would require a change in statute, and it is therefore speculative whether the company would ever have such a claim. MCAAA disputes this claim, asserting that Consumers Energy has not supported it.<sup>38</sup> MCAAA emphasizes, with no real dispute from the parties, that the federal government is not currently pursuing a permanent repository. Mr. Callen testified:

[T]he current situation is that there is no federal spent fuel disposal program, with the sole exception of the continued collection by the federal government of the 1 mill per kWh fee. All available information at this time demonstrates that the Administration and the DOE have wholly repudiated their statutory and contractual duties to undertake SNF disposal.<sup>39</sup>

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<sup>35</sup> Exhibit A-1, page 5, section II (emphasis added).

<sup>36</sup> See MCAAA brief, at page 13, and cross-examination of Mr. Theuer at 2 Tr 81-83.

<sup>37</sup> See 2 Tr 80-83. Consumers Energy also asserts it could not have released a claim it did not have, but has not provided support for this assertion. See, e.g., *Nashville, C & St L Ry Co v United States*, 113 US 261; 5 S Ct 460; 28 L Ed 971 (1885).

<sup>38</sup> See MCAAA brief at page 13.

<sup>39</sup> See Callen, 2 Tr 216; and compare Theuer, 2 Tr 69-75.

This PFD concludes that Consumers Energy's analysis that a total breach claim requires a change in the law is well-supported by case law. The United States Court of Appeals for the Federal Circuit, addressing Indiana Michigan Power Company's damage suit and the types of damages that could be recovered, ruled that utilities could not bring a claim for total breach given the provisions of the NWPA:

The NWPA itself, and the Standard Contract's terms drafted pursuant to it, compelled Indiana Michigan to bring an action for partial, not total, breach. Had Indiana Michigan brought an action for total breach, DOE would have been discharged from further responsibility under the contract, a situation apparently not desired by appellant and foreclosed by statute. The NWPA directed that DOE and all nuclear utilities enter into Standard Contracts . . . and concomitantly conditioned the issuance and renewal of Nuclear Regulatory Commission operating licenses upon the execution of those contracts. . . Additionally, the NWPA directed that DOE was exclusively responsible for SNF collection and disposal in the United States, thereby prohibiting Indiana Michigan or any other nuclear utility from seeking alternative disposal means. . . Therefore, Indiana Michigan had no choice but to hold the government to the terms of the Standard Contract while suing for partial breach.<sup>40</sup>

That utilities are precluded by law from prevailing on a total breach claim was also reiterated in *Yankee Atomic Elec Co v United States*, 536 F3d 1268, 1280 (CA Fed 2008) ("As this court has already acknowledged, the NWPA and the terms of the Standard Contract foreclose any claim for total breach.") Mr. Theuer referenced these cases at 2 Tr 85-86. Thus, this PFD concludes that a claim for total breach would require a change in law and therefore can be characterized as speculative.

Likewise, reviewing the same cases, Mr. Theuer's testimony is persuasive that the phrase "related to or arising out of DOE's delay in performance" refers to a partial breach claim, in contrast to a failure in performance or total breach claim. On this basis, the release language quoted above does not release a total breach claim per se.

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<sup>40</sup> See *Indiana Michigan Power Co v United States*, 422 F3d 1369, 1374 (CA Fed 2005).

Nonetheless, it does appear to this writer that the settlement agreement has changed Consumers Energy's position should DOE be found in total breach of the standard contract. Although Consumers Energy did not release a total breach claim in the settlement agreement, the settlement agreement itself reflects that Consumers Energy has assigned to Entergy its rights and obligations (or delegated its obligations) under the standard contract:

Consumers Energy warrants that it has assigned all of its rights and obligations pursuant to the Contract except for the obligation to pay the one-time fee, provided for in Section III of this Agreement, and its claims described in the Asset Sale Agreement (which are the subject of this Settlement Agreement).<sup>41</sup>

This assignment was made in the asset sale agreement reviewed by the Commission in Case No. U-14992. As the settlement agreement recites, Consumers Energy initially retained both the right to sue for damages for partial breach up to the date of the sale, and the obligation to pay the one-time fee when it became due. Having resolved both the partial breach litigation with this settlement agreement and the outstanding obligation, and warranted to the United States that it assigned "all of its rights and obligations," it is difficult to understand on what basis Consumers Energy could maintain any further litigation against the DOE for performance or rescission of the standard contract. Ordinarily, such an assignment would transfer the right to sue for breach of contract to the assignee, Entergy. Instead, by retaining the one-time fee money and the obligation to discharge the liability when it became due, Consumers Energy retained a potential claim to that money in the eventuality that the federal government never accepts waste for permanent disposal.

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<sup>41</sup> See Exhibit A-1, page 3, paragraph I.F, also quoted above.

Thus, balanced against the benefits of the settlement is the potential that without retention of the one-time fees, Consumers Energy has relinquished a claim to title to those fees in the future. This is not because the company released a total breach claim, but because it appears that any such claim would have been transferred to Entergy as a result of the assignment, and Consumers Energy no longer holds a stake in such a claim because it no longer has possession of the funds.<sup>42</sup>

## 5. Conclusion

Because the possibility of a “total breach” claim is speculative, and because it would apparently require a change in the law to eliminate the DOE liability, it is difficult to evaluate the consequences of this change in the company’s position. Reviewing MCAAA’s proposed remedies, however, premised on the assertion that it was not reasonable for Consumers Energy to discharge the liability, it is clear that the proposed remedies are excessive in light of the more speculative harm to ratepayers.

As noted above, MCAAA asks that the Commission require Consumer Energy to place in trust amounts equivalent to the one-time fee liability, with the possible addition of the amount of the company’s past payments of the ongoing fee, or to refund these amounts to ratepayers.

This PFD finds both of these remedies excessive, given the speculative nature of the future claim that may have been waived, and the benefits realized by the settlement agreement. As Consumers Energy argues, the company no longer has possession of the money paid by ratepayers, and a trust fund funded by Consumers Energy serves no

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<sup>42</sup> Note that MCAAA argues that Entergy would not be able to maintain a suit for return of the fees, but MCAAA does not provide legal analysis to support that claim.

obvious purpose since there is no future liability to discharge. Given that DOE has accepted the assignment to Entergy, as provided for in the settlement agreement, evaluating any potential future liability of Consumers Energy for SNF disposal is well beyond the scope of this record.

For these reasons, this PFD recommends that the Commission accept the arguments of the company, Staff, Attorney General, and ABATE and find that the settlement agreement is reasonable and prudent under the circumstances, and in light of the available alternatives.

B. Disposition of the Proceeds

As noted above, Consumers Energy's proposed allocation of the proceeds of the settlement is set forth in Exhibit A-3, with the top half showing the itemized allocation of ratepayer supplied amounts totaling \$23.3 million, and the bottom half showing the allocation of the remaining proceeds to three cost categories, \$54.6 million in expenditures associated with the Big Rock ISFSI, the company's \$30 million payment to Entergy to accept title to Big Rock, and litigation and miscellaneous costs totaling \$12.1 million. The company relies primarily on Mr. Torrey's testimony to support the allocation, with appropriate accounting identified by Mr. Fitzgerald.

Staff relies on Mr. Megginson's testimony, and recommends that the Commission accept the company's proposal to refund \$23.3 million to ratepayers.<sup>43</sup> Staff agrees that this will provide ratepayers a 100% refund of ratepayer-provided funds.

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<sup>43</sup> See 2 Tr 182, and Exhibit S-1.

MCAAA and the Attorney General argue that the company has failed to allocate settlement proceeds to the Palisades ISFSI costs of \$33.7 million, and they argue this additional amount should be refunded to ratepayers. The Attorney General argues in the alternative that the smaller additional amount of \$7.5 million should be refunded.

The company disputes MCAAA's refund analysis, arguing that it is speculative and would prevent the company from fully recovering its Big Rock ISFSI costs and the \$30 million payment to Entergy, and arguing that the company's proposed allocation is preferable.

To evaluate the appropriate allocation of the proceeds it is necessary to start with a review of the elements of the company's damage claim against the DOE. On this record, the only list of the "but for" costs the company incurred as a result of the DOE breach is contained in Exhibit MCAAA-5, page 4, which itemizes a total claim of approximately \$150 million. This itemization is incomplete because it includes only some of the company's litigation costs, and excludes the \$4.9 million in letter of credit fees.

The elements of the company's damage claim resolved by the settlement agreement are discussed in more detail below.

1. Review of claim elements

- a. Litigation expenses

Litigation expenses identified on this record total approximately \$10.7 million, including the \$3.5 million identified in Exhibit A-3 as paid by ratepayers, plus a portion of

the "litigation and miscellaneous" expenses identified on the lower half of Exhibit A-3.<sup>44</sup> Consumers Energy argues it should recover its litigation expenses from the settlement proceeds, although the settlement agreement expressly provides that litigation expenses are not recovered under the settlement agreement, and although the company acknowledges that it would not have been able to recover attorney fees from the United States had the case proceeded to trial.<sup>45</sup> Consistently, the company also proposes to refund to ratepayers the amount of general litigation expenses its analysis indicates were recovered through rates. No party opposes the allocation of the settlement proceeds to defer the litigation expenses, and on this record, no party argues that the company's litigation expenditures were unreasonable or imprudent. Therefore, this PFD finds that it is reasonable that the proceeds first offset the costs of litigation.

b. Remaining amounts previously included in customer rates

In addition to \$3.5 million in litigation expenses Consumers Energy recovered through rates, as discussed in subsection 1 above, the company identified an additional \$19.8 million in costs recovered through rates that were also costs attributable to the DOE's delay in accepting SNF. These amounts include the following: Securitization – Palisades (\$10.4 million); Enhanced Security Costs – Big Rock and Palisades (\$1.7 million); Stranded cost – Palisades (\$0.2 million); Section 10d(4) Regulatory Asset

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<sup>44</sup> The total amount of \$12.1 million shown in that line also includes approximately \$4.9 million in letter of credit fees, discussed separately below, leaving \$7.2 million in litigation expenses.

<sup>45</sup> See the trial court's decision recognizing that Consumers Energy dropped its claim for legal fees, and permitting it to present evidence had the matter gone to trial regarding its expert witness costs. See *Consumers Energy Co v United States*, unpublished order of the United States Court of Claims, issued January 11, 2011 (Docket No. 02-1894C), 2011 WL 8144367.

– Palisades (\$0.7 million); Post-securitization costs in general rates – Palisades (\$0.7 million).<sup>46</sup>

No party objected to the allocation of proceeds to these categories.

c. \$30 million payment to Entergy

Related to its sale of Palisades to Entergy in 2007, Consumers Energy paid Entergy \$30 million to assume title to the Big Rock ISFSI. The asset sale agreement preserved Consumers Energy's ability to seek reimbursement of this amount from DOE.<sup>47</sup> In Case No. U-14992, Consumers Energy sought to recoup the \$30 million payment by deducting it from the proceeds of the Palisades sale.<sup>48</sup> MEC/PIRGIM argued in response that Consumers Energy should recover the \$30 million payment through its lawsuit against DOE. In its March 27, 2007 order in that case, the Commission deferred the company's request to recover the \$30 million to the company's next rate case.<sup>49</sup>

MEC/PIRGIM and ABATE argue that the \$30 million payment for the Big Rock ISFSI should not be taken out of proceeds nor should it be recovered from ratepayers. According to MEC/PIRGIM, this cost should be recovered from Consumers' litigation with the DOE over the DOE's failure to accept SNF from Big Rock. Alternatively, MEC/PIRGIM assert that Consumers should pay this cost out of the funds that it collected for Big Rock decommissioning from 2001-2003, which it failed to deposit into the decommissioning trust fund.

The Staff also recommended that Consumers' proposed \$30 million payment to ENP for the Big Rock ISFIS not be charged to ratepayers until Consumers' suit against the DOE is decided and any damages are received. The Staff further observed that the \$30 million payment to ENP represents a negotiated amount calculated to recover current and future

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<sup>46</sup> See Exhibit A-3, lines 2 through 8.

<sup>47</sup> See March 27, 2007 order, Case No. U-14992, page 19.

<sup>48</sup> *Id.*

<sup>49</sup> See March 27, 2007 order, page 55.

costs of SNF storage and therefore does not represent a current cost of service for the utility.

. . . In response to the Staff and MEC/PIRGIM's recommendation that the \$30 million payment be deferred pending the outcome of the litigation against the DOE, Consumers argues that the payment for the Big Rock ISFSI was prudently planned as part of an overall transaction that demonstrates significant benefits for ratepayers. Consumers concludes that it should not be penalized by being required to finance this payment to ENP pending the outcome of litigation that may take years to complete.

The Commission finds that its decision on this issue should be deferred until Consumers' next rate case. In that proceeding, the Commission requests that the parties more fully address the arguments raised here as well as the effect of the United States Federal Court of claims' decision in *Consumers Energy Co v United States*, 65 Fed Cl 364 (2005), on the Commission's determination. Consumers can also provide the Commission with an update on the status of the litigation against the DOE. For the purposes of this case, the sale proceeds will not be offset by any payment for the Big Rock ISFSI.<sup>50</sup>

In the company's next rate case, it initially sought approval of a surcharge to cover all its "nuclear legacy costs", but withdrew the request. Then, in Case No. U-16511, reconciling the Big Rock decommissioning surcharge and costs, Consumers Energy indicated that it would defer seeking recovery of the \$30 million Entergy payment as well as the \$54.6 million Big Rock ISFSI costs because it was seeking recovery of those costs through its DOE litigation:

Consumers stated that it is seeking recovery of SNF storage costs from the Department of Energy (DOE) in litigation that was commenced in 2002. In that litigation, Consumers alleges that the DOE breached its obligation to take customer of SNF pursuant to a schedule required by contract. Consumers stated that it intends to pursue the litigation; however, if it is ultimately unsuccessful in recovering the costs, the company will petition the Commission for relief.<sup>51</sup>

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<sup>50</sup> See March 27, 2007 order, pages 81-82.

<sup>51</sup> See February 8, 2010 order, Case No. U-15611, at n1.

Although noting the Attorney General's opposition to deferring the issue, the Commission's February 8, 2010 order in that case indicated as follows:

The ALJ agreed with Consumers that regulatory treatment of the \$84.6 million in SNF costs is not at issue in this case and that it is unnecessary for the Commission to address these costs at this time.<sup>52</sup>

The July 7, 2011 settlement agreement expressly provides for a payment of \$30 million to cover the \$30 million Big Rock payment, with a further provision regarding future claims that might be raised by Entergy:

This Settlement Agreement reflects the recovery by Consumers Energy of the Big Rock Amount referenced in Sections 6.14 and 6.25 of the Asset Sale agreement identified herein. Accordingly, Consumers Energy shall indemnify and hold harmless the Government from and against any and all claims, demands, liabilities, losses, and damages asserted by Energy Nuclear Palisades, LLC, its successors and assigns ("Entergy"), against the Government arising after the closing date of April 11, 2007 ("Future Claim") of the Asset Sale Agreement between Consumers Energy and Entergy Nuclear Palisades, LLC, dated July 11, 2006, and only to the extent that such Future Claim meets the following criteria: (i) the Future Claim is one for recoverable damages arising after April 11, 2007 and resulting from DOE's delay in commencing acceptance of SNF/HLW from Big Rock (currently located at the Big Rock ISFSI) for disposal pursuant to the Contract, and (ii) only to the extent that the Future Claim includes a claim for recovery by Entergy of all or any portion of the first \$30 million of recoverable damages arising after April 11, 2007 with respect to the Big Rock ISFSI (the "Big Rock Amount"), as referenced in Sections 6.14 and 6.25 of the Asset Sale Agreement.<sup>53</sup>

As shown in Exhibit A-3, line 12, the company's proposed allocation of \$30 million of the proceeds to itself would directly offset this past cost that was not recovered from ratepayers.

Opposing the company's allocation, MCAAA argues that Consumers Energy did not have a compelling claim to recover what should be viewed as the recovery of future

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<sup>52</sup> See February 8, 2010 order, at n2.

<sup>53</sup> See Exhibit A-1, page 7, paragraph IV.A.

costs.<sup>54</sup> Mr. Theuer testified that the company received some favorable trial court rulings on this element of its claim, but acknowledged that the company faced litigation risk associated with it.<sup>55</sup>

Because the Commission has consistently encouraged Consumers Energy to pursue recovery of the \$30 million Entergy payment as an element of the company's damage claim against DOE, this PFD finds that it is appropriate that Consumers Energy recoup at least a portion of this amount from the settlement proceeds, as discussed in more detail below.

d. Big Rock ISFSI

Consumers Energy also proposes to allocate \$54.6 million of the proceeds to compensate the company for costs associated with the Big Rock ISFSI. Unlike the \$30 payment to Entergy, no express provision in the settlement agreement addresses the company's Big Rock ISFSI claim. But as with the \$30 million Entergy payment, in Case No. U-14992, the Commission recognized that the company had a claim for recovery of these costs from the DOE, and initially deferred ruling on the company's request to recover the costs from ratepayers. Likewise, the Big Rock ISFSI costs were also the subject of the footnotes in Case No. U-16511, quoted above. Consumers Energy also acknowledged that it faced litigation risk regarding this claim.<sup>56</sup>

Because the Commission initially deferred recovery of this amount pending the DOE litigation, this PFD finds that it is appropriate that Consumers Energy recoup at

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<sup>54</sup> See MCAA reply brief, pages 6-7, also citing *Indiana Michigan Power Co v United States*, 422 F3d 1369 (CA Fed 2005).

<sup>55</sup> See 2 Tr 97-99, and Exhibit MCAA-10, discovery response U-16861-MCAA-CE-9.

<sup>56</sup> See Exhibit MCAA-10, discovery response U-16861-MCAA-CE-10.

least a portion of this amount from the settlement proceeds, as discussed in more detail below.

e. Palisades

In proposing the allocation set forth in Exhibit A-3, Consumers Energy has not proposed to allocate the settlement proceeds to cover its claim for recovery of costs attributable to the Palisades ISFSI. MCAAA and the Attorney General argue that some of the proceeds should be allocated to these costs, and further that the allocated amount should be refunded to ratepayers. MCAAA and the Attorney General rely on Mr. Peloquin's testimony, which identified \$33.7 million as the amount of the company's Palisades ISFSI claim-related costs that were not included in the company's Exhibit A-3.<sup>57</sup> The Attorney General argues:

The absence of any Palisades ISFSI cost recovery from Exhibit A-3 and A-6 is remarkable since the Company's brief admits those costs were recoverable from DOE. CEC Co does not claim that it was not entitled to recover Palisades ISFSI costs from DOE; nevertheless, those costs are excluded from Exhibit A-3 and A-6. CEC Co's testimony and exhibits were silent about recovery from DOE of costs the Company incurred to build the Palisades ISFSI. Thus, the Attorney General must conclude either CEC Co failed to sue DOE to recover its Palisades ISFSI costs or CEC Co agreed not to include those costs in the settlement despite the undisputed fact that CEC Co was entitled [to] recover those costs via its lawsuit.<sup>58</sup>

While Consumers Energy opposes allocating any of the proceeds to the Palisades ISFSI costs and opposes refunding to ratepayers any amounts so allocated, the company did not challenge Mr. Peloquin's calculation of \$33.7 million amount.

This PFD recommends allocating a portion of the settlement proceeds to the Palisades ISFSI claim element. First, there is no doubt that the Palisades ISFSI costs

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<sup>57</sup> See Peloquin, 2 Tr 280-281. His calculation in Exhibit MCAAA-5, page 3, lines 9 and 16 excludes depreciation amounts recovered through rates.

<sup>58</sup> See Attorney General reply brief, page 6.

were an element of the company's damage claim against the DOE. The list of claim elements in Exhibit MCAAA-5, page 4, shows Palisades ISFSI related claims totaling \$52 million. And in Case No. U-14992, the Commission clearly recognized that the company had a claim against DOE for recovery of the costs of the Palisades ISFSI, and directed Consumers Energy to report to the Commission the final adjudication of that claim:

However, the Commission finds that Consumers should be required to report to the Commission on the outcome of litigation with the DOE regarding the Palisades ISFSI issue within 30 days of the issuance of any final determination by a court.<sup>59</sup>

As with the other elements of its damage claim, Consumers Energy also faced litigation risk with regard to this element.<sup>60</sup> But there is no basis on this record to conclude that Consumers Energy faced greater litigation risk regarding its Palisades ISFSI claim so as to defeat any claim for recovery. Given that the company presented the Palisades ISFSI costs as an element of its damage claim, and the Commission had indicated the importance of a report on this specific item, this PFD finds that it is reasonable to allocate a portion of the proceeds to the Palisades ISFSI cost element.

Note that the Attorney General also argued that because CECO's presentation indicates either no attempt to recover Palisades ISFSI costs or the failure to include any amount for that purpose in the final settlement, its actions were not reasonable and prudent.<sup>61</sup> While there is no evidence that Consumers Energy ignored the Palisades ISFSI claim in negotiations, although it largely ignored the claim in its allocation of the

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<sup>59</sup> See Order, page 92 (emphasis added).

<sup>60</sup> See Theuer, 2 Tr 91, Exhibit MCAAA-12, discovery response U-16861-MCAAA-CE-11.

<sup>61</sup> See Attorney General reply brief, page 8.

proceeds, the allocation of proceeds to claim elements as recommended in this PFD obviates any such concern.

f. Letter of credit fees

The company's litigation and miscellaneous expense category on line 13 of Exhibit A-3 includes \$4.9 million in fees paid to maintain a letter of credit in the amount of the DOE one-time fee liability, required as part of Consumers Energy's contracts with Entergy. MCAAA argues that none of the settlement proceeds should be allocated to the letter of credit fees, because Consumers Energy did not include the letter of credit fees as an element of its damage claim in the DOE litigation, and because the Commission has previously declined to grant rate recovery of the letter of credit fees to Consumers Energy. Mr. Peloquin testified:

The Commission has previously ruled that the DOE Letter of Credit costs are not recoverable from the ratepayers. Referencing workpaper MAT-10 (attached to my Exhibit MCAAA-5), Consumers did not even request DOE reimbursement for the DOE Liability Letter of Credit costs. Since these costs are not recoverable from either the DOE or ratepayers, Consumers cannot recover them.<sup>62</sup>

Consumers Energy argues in response that the DOE letters of credit were incurred because the Palisades sale to Entergy occurred while the one-time fee DOE liability was outstanding, and customers have never paid for any portion of these costs.<sup>63</sup>

In its June 10, 2008 order in Case No. U-15245, the Commission declined to include the letter of credit fees in the company's electric rates, recognizing that the company could seek recovery through its DOE litigation:

[I]t is not clear what role the letter of credit played in enabling the Palisades transaction to be completed or how it affected the balance of

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<sup>62</sup> See 2 Tr 282-283.

<sup>63</sup> See Torrey, 2 Tr 158.

benefits and obligations being exchanged between buyer and seller. Because it relates to DOE's longstanding, as-yet unresolved failure to discharge its SNF responsibilities, it is also unclear why ratepayers should bear additional costs in anticipation of a possible litigation outcome.<sup>64</sup>

Because the Commission has previously identified the company's letter of credit fees as an element of its but-for damage claim, and because the company compromised this claim through the settlement agreement as discussed in section A above, this PFD finds that it is appropriate that a portion of the proceeds be allocated to this element of the company's damage claim.

## 2. Allocation of proceeds to claim elements

The foregoing review of the elements of the company's damage claim reflects that the settlement agreement compromised claims totaling somewhat more than \$150 million, including all litigation expenses and the letter of credit fees. Although the company acknowledged that the settlement agreement was reasonable in part because it avoided the litigation risk that the company would not recover all elements of its damage claim at trial, the company did not provide an analysis of its litigation risk broken by down by each element of its claim. The list provided in response to MCAA's discovery question 12, Exhibit MCAA-10, identifies general defenses raised by the United States in litigation, including: "lack of causation, foreseeability and reasonable certainty, as well as various asserted offsets to damage." Further, as to specific cost items, the exhibit identifies additional issues only in regard to listed items totaling \$53 million out of the \$150 million claim. These additional objections include: "not incremental to breach", "not recoverable as a matter of law" and "not supported by

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<sup>64</sup> See June 10, 2008 order, page 47.

adequate detail/documentation”. The discussion in subsection 1 above shows that the company faced litigation risk with regard to each element of its damage claim. And there is no basis on this record to conclude that the company faced greater litigation risk for any element.

Moreover, although the settlement agreement itself makes express provision for the treatment of two elements of the claim, litigation costs, and the \$30 million Entergy payment, Consumers Energy did not claim that these provisions dictate the allocation of the settlement proceeds. Indeed, Consumers Energy proposes to allocate proceeds to both litigation costs, which the settlement agreement indicates were not recovered, and the entirety of the \$30 million Entergy payment, which the settlement agreement indicates was recovered. And regarding the Entergy payment, consistent with the discussion above, Consumers Energy does not argue that there was no litigation risk associated with its claim to recover the full amount at trial, and does not argue that the settlement agreement provision was insisted on by the federal government. Therefore, this PFD finds that the express provisions in the settlement agreement regarding the damage award should not dictate the allocation of the proceeds.

Instead, consistent with the foregoing discussion of each element of the company’s claim, this PFD recommends that the Commission allocate the proceeds first to cover the litigation expenses. No party argued that the litigation expenses were not reasonable and prudent, or reasonably necessary to prepare for trial and settlement. Even though Consumers Energy acknowledged that it could not legally recover such expenses from the federal government in its litigation, it is appropriate to offset any

damage award by the reasonable costs of the litigation. This also provides appropriate incentives for the company to litigate future claims.

Subtracting the total amount of litigation expenses from the \$120 million in settlement proceeds leaves \$109.3 million to be allocated. Lacking any basis on this record to assign litigation risk differentially to the remaining elements of the company's compromised claims, this PFD recommends that this \$109.3 million be allocated to each element of the company's claim pro rata, after litigation expenses are recovered. To do that, it is first necessary to determine all elements of the company's but-for claim that were compromised by the litigation, after all litigation expenses are recovered:

|  |                       |
|--|-----------------------|
| 1. Costs included in customer rates, less legal costs: | \$23.3 million        |
|  | <u>-\$3.5 million</u> |
|  | \$19.8 million        |

2. Other costs identified on Exhibit A-3, less legal costs:

|                       |                |
|-----------------------|----------------|
| Big Rock ISFSI        | \$54.6 million |
| Payment to Entergy    | \$30.0 million |
| Letter of credit fees | \$ 4.9 million |

|                                     |                |
|-------------------------------------|----------------|
| 3. Additional Palisades ISFSI costs | \$33.7 million |
|-------------------------------------|----------------|

|  |               |
|--|---------------|
| <u>Total claims not including legal costs:</u> | \$143 million |
|--|---------------|

Second, it is appropriate to subtract the total litigation expenses of \$10.7 million from the \$120 million settlement proceeds, leaving \$109.3 million to be allocated to each element. Since the company did not present an analysis of the litigation risk it faced separately for each element of the claims compromised, it is reasonable to allocate the settlement proceeds ratably to each element. That is, for a total of \$143 million in claims, the company recovered \$109.3 million, or approximately 76.4%, over and above its legal expenses. On that basis, this PFD recommends that the

Commission consider that the company recovered 100% of its legal expenses and 76.4% of each other element of its claim in the litigation. This results in the following:

|                                    |   |
|------------------------------------|---|
| Costs recovered in customer rates: | $\$19.8 \text{ million} \times 76.4\% = \$15.1 \text{ million}$ |
| Big Rock ISFSI                     | $\$54.6 \text{ million} \times 76.4\% = \$41.7 \text{ million}$ |
| Payment to Entergy                 | $\$30 \text{ million} \times 76.4\% = \$22.9 \text{ million}$   |
| Letter of credit fees              | $\$4.9 \text{ million} \times 76.4\% = \$3.7 \text{ million}$   |
| Additional Palisades ISFSI         | $\$33.7 \text{ million} \times 76.4\% = \$25.7 \text{ million}$ |

Legal costs recovered at 100%:

|  |               |
|--|---------------|
| Legal costs recovered in customer rates: | \$3.5 million |
| Legal costs paid by Consumers Energy:    | \$7.2 million |

3. Division of proceeds between ratepayers and Consumers Energy

Consistent with the proposed allocation of proceeds in subsection 2, this PFD recommends that the \$3.5 million in legal costs paid by ratepayers be refunded to ratepayers, as well as the proportionate share of the claim elements recovered through customer rates, \$15.5 million.

Additionally, this PFD finds that it is reasonable that the \$25.7 million portion of the proceeds allocated to the Palisades ISFSI cost element be refunded to ratepayers.

MCAAA and the Attorney General point to language from the Commission's decision in Case No. U-14992 to support claim that amounts allocated to the Palisades ISFSI cost should be refunded to ratepayers. First, the company made clear it intended only to recover its outstanding investment in the plant:

Consumers asserted that it does not intend to retain any profit from the sale of the plant at above book value. Consumers proposed that the difference between book value and sale price, less transaction costs, should be used to benefit customers in a manner determined by the Commission. As such, Consumers argued that the Commission should

find that Consumers has complied with the requirements of the order in Case No. U-12505.<sup>65</sup>

Also, in that case, MEC/PIRGIM had argued that Consumers should not be authorized to recover costs associated with the Palisades ISFSI for the reason that DOE was the responsible party: "According to MEC/PIRGIM, if Consumers were to recover these costs from ratepayers, this would undermine Consumers' incentive and standing to continue to pursue its DOE lawsuit. Likewise, MEC/PIRGIM argued that even Consumers has admitted that the ISFSI is not a used or useful asset and should not be made recoverable from ratepayers."<sup>66</sup> MEC/PIRGIM asked the Commission to refund the additional amount to ratepayers, rather than allowing Consumers Energy to deduct the book value of the Palisades ISFSI from the sale proceeds. As characterized by the Commission, MEC/PIRGIM argued "ratepayers should not be asked to advance to Consumers any amounts that Consumers should rightfully be seeking instead from the DOE as damages in a proceeding to enforce the contract to handle and provide permanent storage of SNF."<sup>67</sup> The Commission's decision denying MEC/PIRGIM's motion to reopen the record to determine the total Palisades ISFSI cost clearly recognized the ratepayers' interest in the Palisades ISFSI recovery:

The Commission is persuaded that the ALJ properly denied MEC/PIRGIM's February 6, 2007 motion. The issues of whether and how much the DOE may eventually owe Consumers for its breach of the 1983 SNF disposal contract for the Palisades ISFSI expenses are far from being resolved and their final determination is not necessary for the Commission to rule on this application. Consumers' ratepayers have not been harmed by the Commission's decision to move forward. Their rights

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<sup>65</sup> See March 27, 2007 order, page 67.

<sup>66</sup> See March 27, 2007 order, page 31.

<sup>67</sup> See March 27, 2007 order, page 91.

to seek recovery of any amounts eventually recovered by Consumers from the DOE are protected.<sup>68</sup>

In its June 26, 2007 order in Case No. U-14992, the Commission again addressed MEC/PIRGIM's arguments in ruling on its rehearing request:

MEC/PIRGIM, in a related argument, says that the Commission did not take adequate measures to shield ratepayers from the ISFSI storage costs that Consumers incurred at both Palisades and Big Rock. MEC/PIRGIM says that the costs were caused by the United States Department of Energy's (DOE) breach of its standard contract obligation to dispose of spent nuclear fuel (SNF) and that Consumers should recover those costs by holding DOE liable for them in the course of ongoing litigation. According to MEC/PIRGIM, the Commission's rulings on ISFSI costs at Big Rock and Palisades appear in separate portions of its order and suggest that Big Rock's cost are subject to a different treatment than Palisades'. MEC/PIRGIM argues that the Commission should take measures to ensure that the issues are effectively litigated in the rate case and that the Staff should conduct a full audit.

As stated in the March 27, 2007 order . . . Consumers' and the nuclear industry's efforts to litigate SNF costs with the federal government have been protracted, and the prospects for eventual success are not assured. Nevertheless, the Commission hopes for a positive outcome that secures the safe disposal of SNF at no cost beyond what federal law already requires. It expects Consumers to pursue this course of action diligently and prudently and, for this reason, directed Consumers to provide an update on the status of the DOE litigation during the rate case. It would be premature to make any further ruling on the rate effects of the issue at this time.

The Commission did not intend to provide different types of treatment for Palisades' and Big Rock's ISFSI-related costs. The discussion regarding issues deferred for the rate case at page 82 of the March 27, 2007 order specifically referenced the recovery of the \$30 million paid to ENF to accept the Big Rock ISFSI. The discussion of Palisades ISFSI costs at page 92 required Consumers to report on the outcome of litigation with DOE within 30 days of the issuance of a final determination by a court. To clarify, the status update required in the rate case . . . should cover litigation for both plants, and Consumers' obligation to file a report within 30 days of a final court determination also applies to both plants.<sup>69</sup>

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<sup>68</sup> See March 27, 2007 order, page 92.

<sup>69</sup> June 26, 2007 order, pages 5-6.

Consumers Energy relies primarily on Mr. Torrey's testimony to explain why refunding Palisades-related recoveries to ratepayers would be inappropriate:

Mr. Torrey provided a list of reasons why Mr. Peloquin's proposal should be rejected. First, he explains that the refund of \$23.3 million returns 100% of the amounts that were included in Consumers Energy's damage claim against the federal government that had previously been paid by customers. 2 TR 155. Staff's witness Megginson agreed with this. 2 TR 192-193. Distributing more of the lawsuit proceeds to customers would "return" amounts to customers that they never paid.

Second, Mr. Torrey described the highly speculative nature of Mr. Peloquin's proposal. Mr. Torrey noted that, while the DOE lawsuit settlement results in a recovery of \$120 million, Consumers Energy's claim exceeded \$150 million. Thus, over \$30 million of costs incurred by the Company and never paid for by customers, were not recovered. Mr. Peloquin would like to assume that 100% of the Palisades ISFSI costs are included in the \$120 million of recovered costs, but there is no way that he or anyone else can know that. His position is wholly speculative. 2 TR 155.

Third, Mr. Peloquin's proposal requires the assumption that Entergy would have paid the same total purchase price for the Palisades plant even if the book value of the plant was reduced to eliminate the cost of the ISFSI. As Mr. Torrey testified, this is speculation: "[i]t seems just as likely that the total purchase price would have been reduced by whatever amount was not reflected in the book value of the plant; i.e., that Entergy was willing to pay a certain dollar premium relative to book value, and no more." If so, excluding the Palisades ISFSI from the book value of the plant would have made no difference in the above-book value amount realized from the sale to Entergy. 2 TR 156.

Fourth, as noted above, Consumers Energy incurred more than \$30 million in damages that were never paid by customers and not recovered in the lawsuit settlement. It is unreasonable to distribute to customers amounts they never paid, while at the same time more than doubling the amount of costs incurred by the Company that go unrecovered. 2 TR 156.

Fifth, even if all of his speculations were accepted as true, Mr. Peloquin's proposal is based on the premise that customers are entitled to 100% of any above-book value amount received from the sale of the Palisades plant. There is no such legal entitlement. In addition, customers already benefited handsomely from the sale of the Palisades plant. . . .

Distributing yet additional amounts to customers that were never paid in rates is not legally required, and would be inappropriate. 2 TR 156-157.

Sixth, adoption of Mr. Peloquin's proposal would mean that the remaining proceeds from the lawsuit settlement are insufficient to cover the \$54.6 million cost of the Big Rock ISFSI and the \$30 million payment to Entergy.<sup>70</sup>

The Attorney General addressed the company's arguments in his reply brief.<sup>71</sup>

He argues that the Palisades ISFSI costs were an offset to the Palisades purchase price in U-14992, and thus CECo reduced the net gain paid to customers in U-14992 in order to allow CECo to recover its Palisades ISFSI costs. He further argues that nothing in the record supports the conclusion that the purchase price was higher because of the \$36 million ISFSI amount, except for Mr. Torrey's speculative claim that it was just as likely that the total purchase price would have been reduced if the ISFSI had not been reflected in CECo's book value of the plant.

To the extent Consumers Energy's argues that allocation of the proceeds to fully cover the Palisades ISFSI damage claim element ignores other elements of the damage claim, this PFD finds that those arguments are reasonably addressed by the allocation of proceeds to claim elements recommended in section 2 above.

Turning to the company's argument that refunding any portion of the proceeds to ratepayers for the Palisades ISFSI portion of the claim requires speculation, this PFD rejects this argument. It is not necessary to speculate about what Entergy would have paid for Palisades if the book value had been different. That sale is in the past; the proceeds have already been allocated. The point MCAAA and the Attorney General are making is that the Commission subtracted the book value of the company from the sale

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<sup>70</sup> See Consumers Energy brief, pages 17-19.

<sup>71</sup> See Attorney General reply brief, pages 6-9.

proceeds in determining the amount to refund to ratepayers, acknowledging that this allowed Consumers Energy to recover its Palisades ISFSI costs. The Commission rejected claims in Case No. U-14992 to refund additional amounts pertaining to the Palisades ISFSI to ratepayers, choosing instead to await the results of the company's litigation. Because Consumers Energy received the equivalent of rate reimbursement for those ISFSI costs through the subtraction from the proceeds, even though the ISFSI costs were not directly recovered through rates, it is appropriate that amounts recovered from the DOE attributable to the Palisades ISFSI damage claim be refunded to ratepayers.

The remaining piece of Consumers Energy's argument is that because the Commission deferred consideration of rate recovery of certain utility expenditures pending the company's DOE litigation, \$54.6 million for the Big Rock ISFSI and the \$30 million payment to Entergy, any of those costs not recovered from the proceeds must be recovered from ratepayers:

As Mr. Torrey explained, a decision on the ratemaking recovery of those costs had been deferred while the DOE lawsuit was being processed. A primary benefit of the lawsuit settlement is that the \$120 million damage payment allowed recovery of this \$84.6 million in costs, and avoided having customers pay that amount. If Mr. Peloquin's proposal is adopted, a significant portion of these costs will be unrecovered, and it will be necessary to seek their recovery from customers.<sup>72</sup>

This PFD acknowledges that the allocation proposed by Consumers Energy avoids the potential of outstanding rate issues for future cases. On the other hand, as discussed above, Consumers Energy has not presented any reason beyond administrative convenience for failing to allocate any of the settlement proceeds to its Palisades ISFSI

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<sup>72</sup> See Consumers Energy brief, page 19.

claim. The recommendation in this PFD to prorate the proceeds equally to all elements of the company's damage claim resolved by the settlement agreement leaves the company free to request rate recovery of the unrecovered amounts attributable to the Big Rock ISFSI and \$30 million Entergy payment. However, should Consumers Energy seek to do so, it would be required at that time to establish that the costs were reasonable and prudent, and appropriate for rate recovery. Moreover, at least as to the Big Rock ISFSI costs, the company would have to address the factors that led it to settle for less than full recovery of those costs, including any claims by the federal government that the expenditures were unnecessary or excessive.

For these reasons, this PFD recommends that the Commission allocate the proceeds between Consumers Energy and its ratepayers as follows:

|  |
|--|
| Total refund to ratepayers: \$15.1 million |
| \$3.5 million                              |
| <u>\$25.7 million</u>                      |
| \$44.3 million                             |

|   |
|---|
| Total retained by Consumers Energy: \$120 million |
| - <u>\$44.3 million</u>                           |
| \$75.7 million                                    |

### III.

### **CONCLUSION**

Based on the foregoing discussion, this PFD recommends that the Commission find Consumers Energy's settlement reasonable and prudent, formally rescind the requirement that Consumers Energy create a trust fund for the one-time fee DOE liability, and reject proposals for the creation of additional trust funds for SNF disposal.

In addition, this PFD recommends that the Commission determine that refunds of the settlement proceeds to ratepayers totaling \$ 44.3 million are appropriate, with the \$75.7 million balance to be retained by Consumers Energy, and direct Consumers Energy to revise its accounting accordingly.

MICHIGAN ADMINISTRATIVE HEARING  
SERVICES  
For the Michigan Public Service Commission

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Sharon L. Feldman  
Administrative Law Judge

Issued and Served: 9/19/12  
drr